# Petition

81-1554

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

NO _____

RUTH CLARK AND CHARLES E. BUNKER,

Petitioners,

v.

THE CITY OF LOS ANGELES, AND THE
LOS ANGELES POLICE DEPARTMENT,

Respondents

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# PETITION FOR A WRIT OF CERTIORARI

# TO THE U.S. COURT OF APPEALS

# FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED

Did the Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision by: (a) failing to "examine the record", as required by statutory and case law, before rendering judgment, and (b) failing to cure the inadequate review by granting a rehearing before an unbiased panel, rather than attempting to cure by examining the record after rendering the judgment?

All parties to the proceedings in the court whose judgment is sought to be reviewed are named in the caption.

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E. GROUNDS ON WHICH JURISDICTION IS INVOKED:

1. Date of Judgment, Circuit Court of Appeals for the Ninth Circuit: July 13, 1981.

2. Date of Circuit Court's Denial of Petition for Rehearing: Nov. 20, 1981. (The ninety day period expires February 18, 1982.)

3. Statutory Provisions conferring on this Court jurisdiction to review by writ of certiorari: 28 U.S.C.A. §1254(1).

F. STATUTES INVOLVED:

1. Title 28, U.S.C.:

§2111. Harmless Error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

2. Rule 803(6), Federal Rules of Evidence:

(6) THE FOLLOWING ARE NOT EXCLUDED BY THE HEARSAY RULE, EVEN THOUGH THE DECLARANT IS AVAILABLE AS A WITNESS:

RECORDS OF REGULARLY CONDUCTED ACTIVITY. - A MEMORANDUM, REPORT, RECORD, OR DATA COMPILATION, IN ANY FORM, OF ACTS, EVENTS, CONDITIONS, OPINIONS, OR DIAGNOSES, MADE AT OR NEAR THE TIME BY, OR FROM INFORMATION TRANSMITTED BY, A PERSON WITH KNOWLEDGE, IF KEPT IN THE COURSE OF A REGULARLY CONDUCTED BUSINESS ACTIVITY, AND IF IT WAS THE REGULAR PRACTICE OF THAT BUSINESS ACTIVITY TO MAKE THE MEMORANDUM, REPORT, RECORD, OR DATA COMPILATION, ALL AS SHOWN BY THE TESTIMONY OF THE CUSTODIAN OR OTHER QUALIFIED WITNESS, UNLESS THE SOURCE OF INFORMATION OR THE METHOD OR CIRCUMSTANCES OF PREPARATION INDICATE LACK OF TRUSTWORTHINESS. THE TERM "BUSINESS" AS USED IN THIS PARAGRAPH INCLUDES BUSINESS, INSTITUTION, ASSOCIATION, PROFESSION, OCCUPATION, AND CALLING OF EVERY KIND, WHETHER OR NOT CONDUCTED FOR PROFIT.

## STATEMENT OF THE CASE

The action below was filed in February of 1977 by two "street vendors" from the beach area of Los Angeles, alleging that the City of Los Angeles, the Los Angeles Police Department, and certain named individuals, deprived plaintiffs of constitutional rights to due process and equal protection in the enforcement of local ordinances. The complaint sought monetary damages and injunctive relief against the police from harassment, intimidation, and interference with business, as well as a declaration as to the constitutionality of one of the ordinances. Jurisdiction was based on 28 U.S.C. §§1331 and 1342. An immediate temporary restraining order and a subsequent preliminary injunction issued against the police preventing further

police interrogations as to licensing on plaintiffs' property, and the action for damages was tried to a jury in November, 1978. The trial lasted twelve days, during which time plaintiffs presented the testimony of twenty witnesses and introduced into evidence 56 documents, three films, and six hundred photographs in support of their contention that they had been openly discriminated against in the enforcement of ordinances, that they had been denied due process in their attempts to obtain licenses and pursue legal avenues of relief through administrative channels, and that they had been subjected to demeaning and oppressive harassment and intimidation by police officers. Plaintiffs sought damages for loss of earnings from their business, as

well as compensatory damages for trauma, pain and suffering, and anxiety connected with harassment, physical abuse, and intimidation by police.

The trial was concluded prior to this court's decision in Owen v. City of Independence, 445 U.S. 622, 100 S.Ct 1398, 63 L.Ed.2d 673 (1980), and the City defendant on the still-available theory of "good faith" in its enforcement activities. The good faith defense was rejected by the jury, and on December 1, 1978, verdicts in the amount of $60,000 were returned.

The jury found, having been instructed under Monell v. Department of Social Sciences, 436 U.S. 658 (1978), that the discrimination, harassment, denial of equal protection, and deprivation of due process were the result of the acts and

policies of the City's policy-making officials. The defendants' motions for directed verdict and judgment notwithstanding the verdict were denied.

Defendants appealed the verdict on two grounds: a) whether the District Court committed reversible error in admitting plaintiffs' business records over objection, and b) whether the district court erred in denying defendants' motions for directed verdict and judgment notwithstanding the verdict. Plaintiffs responded by stating that a) the document in question qualified under the hearsay exceptions of the Federal Rules of Evidence, b) assuming, arguendo, it did not qualify, receipt into evidence was "harmless error" due to the overwhelming amount of other, independent, unchallenged evidence proferred, and c) the motions

were properly denied by the trial court due to the overwhelming evidence presented.

The United States Court of Appeals for the Ninth Circuit, focusing solely on the first ground of appeal, reversed and remanded on the basis that the document in question did not qualify as a "business record" or under any other hearsay exception, was highly prejudicial and not harmless due to its emotionally written style, and required a new trial. The Court specifically declined to rule on the second issue of appeal, regarding the sufficiency of evidence to support the verdict. (See opinion in Appendix A, Clark v. City of Los Angeles, 650 F.2d 1033).

Upon receipt and review of the circuit court opinion, petitioners surmised

that the conclusion of the court, to wit, that one document was so "prejudicial" as to outweigh all other evidence, taken together with the court's failure to reach the "sufficiency of the evicence" issue, could only have been based upon a failure to review the other evidence. Upon investigation by counsel, this surmise was confirmed by district and appellate court docket records demonstrating that the evidence had never left the custody of the District Court clerk in Los Angeles, as recited in the "Declaration of John B. Murdock, Counsel to Appellees, In Support of Petition for Rehearing"(see Appendix B). Thus, rehearing en banc was sought on the ground that it was impossible for the Circuit panel to conclude that one exhibit was not "harmless" if the panel had not

reviewed the entirety of the remaining evidence (consisting of several films, 600 photographs, and 56 documents) to determine whether liability existed independently of the "hearsay" evidence. Plaintiffs requested that the matter be referred to a new panel because the previous panel, having published a written opinion emphatically stating the error was not harmless, would be unable to reverse itself regardless of the strength of the evidence. To do so would be to admit error in the panel's failure to provide proper and adequate appellate review.

After the passage of four months from the filing of the Petition, rehearing en banc was rejected. However, in doing so, the original panel issued an order stating that "[t]he panel has physically viewed the exhibits and finds

that the testimony in the transcripts was sufficient on which to base its decision." (see Appendix C). Thus, the panel adhered to its original decision after reviewing said evidence, and the cause was remanded for a new trial in the District Court. Plaintiffs thereupon filed this Petition for Writ of Certiorari.

## ARGUMENT

I. THE APPELLATE COURT IS REQUIRED BY STATUTE AND CASE LAW TO EXAMINE THE RECORD PRIOR TO RENDERING JUDGMENT, TO DETERMINE WHETHER THE TRIAL COURT HAS ABUSED ITS DISCRETION AND TO DETERMINE WHETHER DISPUTED EVIDENCE WAS HARMLESS OR PREJUDICIAL.

A. THE TRIAL COURT EXERCISED PROPER DISCRETION IN THE ADMISSION OF EVIDENCE BELOW.

The trial below lasted 12 days, during which plaintiffs presented 20 witnesses, 56 documents, three films and six hundred photographs to demonstrate their contentions that they had been harassed, discriminated against, physically abused and denied due process of

law by the City and the police. Exhibit number 105 was a record maintained by plaintiff, Ruth Clark, throughout the course of all dealings by plaintiffs with the City and its agents during their attempts to do business and comply with the law. The document was maintained over the course of several years and consists of 225 pages.

The "business records" exception to the hearsay rule is contained in Federal Rule of Evidence 803(6)[1]. It encompasses and includes any "memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses...", if it was kept in the "regular course of a regularly conducted business activity," (Id).

1/ The full text of Rule 803(6) is contained supra at page x, supra.

The notes of the Advisory Committee to Rule 803(6), Fed. Rules of Evidence, point out that the "rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if the sources of information or other circumstances indicate a lack of trustworthiness". The Advisory Committee notes further indicate that the business records may be in "any form", whether memorandum, report or other compilation, and may contain "opinions" and diagnoses, which are <u>not</u> restricted to opinions of experts. Thus, whether the document in question contains opinion and other hearsay material is not paramount; whether the supposed prejudicial effect of the material is in fact so prejudicial as to require a new trial is

paramount.

Hearsay rules are highly technical and the subject of much debate and disagreement among scholars. The entire thrust of the newly adopted Federal Rules of Evidence is to place the emphasis on the discretion of the trial court in resolving these debates. The circuit court's reliance on the 1943 opinion in Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 demonstrates a lack of appreciation for the changes brought about in the new rules since that decision, and indicates a need for Supreme Court guidance in the area. For example, the court states in Palmer that it will not accept "accident reports" as "business records" because they are not usually related to the operation of the business of a railroad, even if they are regularly

maintained by the business. The court states that a change in the rule permitting documents prepared in any regular course of conduct relating to the business to be admitted would have to come from Congress, not this court. (See 318 U.S. at 114). When the new rules were adopted, the decision in Palmer v. Hoffman was considered; the Advisory Committee Notes to Rule 803(6) refer to the case as an example of a court's concern with motivation, citing the lower court opinion's note that the document in question was "dripping with motivations to misrepresent." (192 F.2d 976, 991 (2nd Cir.1942). The Advisory Committee notes go on to state, however, that the introduction of motivation as a primary consideration in admissibility is a "disturbing factor, since absence of motive to misrepresent

has not traditionally been a requirement of the rule; that records might be self serving has not been a ground for exclusion. [citations omitted]". Thus, it can be seen that the adoption of Rule 803(6), with the broader language encompassing documents made in "the course of a regularly conducted activity", accompanied by the foregoing Advisory Committee notes, is a rejection of the Palmer v. Hoffman approach to exclusion of business records. The court must determine, at the trial level, whether the "sources of information or other circumstances indicate lack of trustworthiness"; the rule provides for the authority to exclude evidence on such a finding. Thus, the determination of "trustworthiness" is vested in the trial court, not in the appellate court.

The trial court examined the document with care and determined that the jury would not be misled.

The history of the receipt of this document into evidence is evidence of whether the trial court abused its discretion. Plaintiffs offered it into evidence on several different occasions during the trial and the trial court rejected its introduction upon each occasion until the Court had had time to review the document in depth. The document was first offered and rejected as an exhibit on Thursday, November 16, 1978 (2 R.T. 379-382). It was again offered and rejected on Friday, November 17 (3 R.T. 542). It was offered and rejected again on Monday, November 20 (4 R.T. 718-719), and offered again on Tuesday, November 21 (4 R.T. 773:9-774:2). The trial judge

stated finally, when counsel offered the document under Rules 803(6) and 803(24), and defense counsel reiterated prior objections, that it would review the document fully in camera and defer ruling until then:

> "The Court: I will have to go through the entire exhibit. There may be certain matters within the exhibit that may properly not come within the rule as you propose. So, I will defer ruling on that." (4 R.T. 773:24-774:2)

The Court in fact deferred ruling until all other evidence had been received by both parties in the trial, reaching its decision on Wednesday, November 29, just prior to opening argument by plaintiffs' counsel. (7 R.T. 1591:8). Thus, a period of thirteen days had elapsed between the initial offer into evidence and the trial judge's decision to admit it, during which

time the trial judge, as well as the jury, had been exposed to all other evidence presented by plaintiffs in support of their contentions. Nine days lapsed between the date the trial judge informed counsel he would defer his ruling to "go through the entire exhibit" and the date he made his decision. Thus, it was not an inadvertent, spur-of-the-moment ruling on the part of the trial judge during the heat of trial. It was a cautious, judicious attempt to review the admissibility of the document under the standards imposed by the new federal rules of evidence.

Was the trial court's decision an abuse of discretion? As the circuit court opinion points out, "if the grounds given by the district court for admissibility of the evidence are incorrect, the court's ruling will be reversed only if there are

no grounds under which the evidence could properly have been admitted [citation]." (650 F.2d at 1036). In this case, the admission of exhibit 105, despite the inclusion of hearsay material, was arguably proper under either Rule 803(5), Rule 803(6), or Rule 106, Fed. Rules of Evid., under the completeness doctrine.

During the cross-examination of Bunker, defense counsel made use of the document and required Bunker to read from it at length, concerning his nightmares from encounters with police. This reading continues for twelve pages in the trial transcript (R.T. 468-480) at the end of which time plaintiffs' counsel moved to have the entire document received under Rule 803(5), "as having been read into the record at the insistence of an adverse party." The motion was denied subject to

being re-raised during redirect. (See R. T. 480). On redirect, the document was later moved by counsel and the court reserved ruling until the end of trial, as noted infra. Thus, the document may be deemed properly admitted pursuant to Rule 803(5) and Rule 106 because it was received at the request of plaintiffs after portions had been entered into the record by the adverse party, defendants. The opinion below does not analyze these grounds for admissibility with regard to plaintiff as the "adverse party", it merely assumes that defendants are the only party who can be called "adverse" for purposes of Rule 803(5). In addition, the court below failed to analyze or consider Rule 106. The opinions in United States v. Rubin, 609 F.2d 51 (2nd Cir.1979) and United States v. Baron, 602 F.2d 1248 (7th Cir.

1979) are instructive in pointing out that while a party may not properly introduce a memorandum on direct examination, if it is utilized in cross-examination, the original proponent may become the "adverse party" who can properly request its admission for completeness or fairness. It is generally not error for the trial court to permit the jury to inspect a writing used to refresh a witness' memory. See, e.g., Borel v. Fireboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973):

> In general, a writing used to refresh a witness's memory is not testimony and is inadmissible when offered by the witness's party. This does not mean, however, that it is always error for the trial court to permit the jury to inspect such a writing. It may be admitted, for example, when offered by the opposing party or when the jury on its own motion requests

> to see it. It may also be admitted when the trial court determines that its inspection would assist the jury in understanding the evidence and would not be prejudicial to the opposing party. The rules on admissibility of such a writing "should not be treated as dogmas of inherent efficiency. They are merely crude rules-of thumb... The trial court's discretion should control". Wigmore, Evidence, §764 (3ed.). (Id at 1102-1103.) (emphasis added).

In the trial below the document was used extensively by plaintiffs to refresh their memories of many seemingly trivial events spanning several years. It is the very nature of the police harassment and bureaucratic circuitry that small details must be remembered in detail in order to present a pattern of conduct that cannot be refuted. The trial court at two points specifically stated that the document was being used pursuant to Rule 803(5) to refresh plain-

tiff's memory, and defense counsel conceded this to be proper:

> "MR. MURDOCK: Your Honor, the witness has previously testified that he couldn't recall these incidents with sufficient detail. I would like to have him read from the record, which constitutes a business record.
>
> THE COURT: Do you have any independent recollection, sir?
>
> THE WITNESS: Not that well, your honor.
>
> THE COURT: Do you feel that by referring to any documents or any items that your memory could be refreshed?
>
> THE WITNESS: Quite a bit, sir.
>
> THE COURT: The objection is overruled. This is refreshing the memory of this particular witness and not the recorded statement rule. Proceed.
>
> (R.T. 542 1.19-543 1.8)
>
> . . .
>
> "Q. Would it refresh your memory on what occurred in 1976 and to correct your

previous testimony as to whether or not you had seen De Amicus after 1975; will you please read beginning September 25th-26th and continue through October 3rd?

"MISS LEWIS: At this time, there would still be a continuing objection to lack of foundation unless this is being admitted for independent recollection.

"THE COURT: It's under 803(5).

"MISS LEWIS: Thank you. (R.T. 547, l.16-25) (emphasis added.)

Thus, there are several grounds for admissibility of the document in the trial court's discretion. At most, it can be said to be a debateable point of evidence which may need clarification from this court. However, the admission certainly does not constitute an abuse of discretion. Moreover, the issue for decision by this court is not the admissibility of the document per se, but rather, even if this

Court finds the document inadmissible and that the trial court "abused its discretion", has the circuit court violated the statutory duties of review by failing to place this document in the context of the entire record before determining that it was not harmless error requiring a new trial.

B. ASSUMING, ARGUENDO, THAT A DISPUTED DOCUMENT WAS INADMISSIBLE HEARSAY, THE CIRCUIT COURT FAILED TO RENDER ITS STATUTORY DUTY TO EXAMINE THE RECORD TO DETERMINE HARMLESSNESS.

Even if one assumes, arguendo, the document was inadmissible, petitioners contend that the appellate court departed not only from the "accepted and usual" course of judicial proceedings (Rule 17.1

(a), Supreme Court Rules), but from the mandatory duty of the reviewing court by failing to adhere to the requirements of statutory law and decisions of this Court, thus calling for an exercise of this Court's power of supervision. The duty ignored by the Ninth Circuit is explicitly stated in 28 U.S.C. §2111, which requires the reviewing court to render its judgment only "after an examination of the record", and to disregard defects which "do not affect the substantial rights of the parties":

> §2111. Harmless Error
> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. (Id, emphasis added)

The court below rendered its judgment without examining the record, despite the insistence of petitioners that the admission of one document, if erroneous, was at most harmless error. The opinion indicates that "because of our holding, it is unnecessary to detail the complicated facts of this case." (650 F.2d at 1035). A short summary, in barest outline form, of the facts is then presented prior to the Court's analysis of the admissibility of Exhibit 105. The opinion does not explicate the evidence presented at trial in an attempt to show whether exhibit 105 was "harmless" or "prejudicial". Instead, the opinion merely describes the Exhibit as one "written in a style designed to arouse sympathy and create enmity for the appellants", (650 F.2d at 1038) and responds to plaintiffs' harmless error

contention as follows:

> "Appellees argue that the diary is mere surplusage and cumulative, since there was overwhelming and other evidence from the testimony of appellees and other witnesses and numerous photographs, films and other exhibits, and that reversal is not appropriate. We cannot agree. The diary went far beyond the other evidence properly brought forth in this case, in that it contained much hearsay and opinion statements, and was written in a highly emotional and sympathetic manner."
> (650 F.2d at 1038).

The court relies upon the opinion in Standard Oil Co. of Cal. v. Moore (9th Cir.1957) 251 F.2d 188, without noting that in Moore the court expressly found that the reversible error was created by lack of foundation for the hearsay evidence and, more importantly, that "if none of these inadmissible exhibits had

been received, the evidence would have been insufficient to support the jury finding that there was such an unlawful agreement, combination or conspiracy." (Id at 216-217). In the instant case, the court did not review the evidence with enough specificity to determine whether the properly admitted evidence was or was not sufficient to support the jury's verdict.

Despite the conclusory nature of the court's statement and the absence of any written analysis of the weight or sufficiency of the "proper evidence" presented to the jury, the normal presumption is that the court has in fact made an "examination of the record" and is here stating its conclusions based upon that examination. However, the appellate court record reveals instead that no examination

was made of the evidence received at trial other than a review of the transcript of testimony. The Petition for Rehearing En Banc was filed after an investigation by counsel confirmed the suspicion that the trial court exhibits had never left the custody of the district court in Los Angeles clerk for review by the appellate court in San Francisco. See Appendix B, "Declaration of John B. Murdock, Counsel to Appellees, In Support of Petition for Rehearing En Banc, With Exhibits". Despite attempts by counsel early in the appellate proceedings to compell appellants to transmit the entire record for review, the exhibits remained in custody of the district court pursuant to rules of the court until such time as requested by the appellate court. (Id; see para.5).

The appellate court, however, never made such a request and the exhibits were never transmitted for review (Id., paras. 3, 4, 6, 7). The Petition for Rehearing was requested en banc in order that the evidence might be reviewed in its entirety by an independent panel, to avoid the obvious bias and prejudice that naturally infected the previous panel by virtue of its extensive written opinion having been published. The opinion is emphatic in its conclusory determination that the disputed evidence is not "harmless", and it was clear that the panel would have to admit error (by omission) in its own review process in order to reverse itself. The one-page Order whereby the rehearing is denied four months later by the same panel was predictable, refusing to change its prior opinion after reviewing the evidence.

The order confirms (officially) the suspicion raised by petitioners' counsel, that the evidence had not previously been reviewed; the panel purports to correct the problem by stating that it has now "physically viewed the exhibits and finds that the testimony in the transcripts was sufficient on which to base its decision." However, this admission that the original decision was based solely on the transcript and that the remaining evidence was reviewed after the Petition for Rehearing was filed, is a tacit admission that the statutory mandate of 28 U.S.C. §2111 had not (and still has not) been complied with: the appellate court must render its judgment after an examination of the record. In this case, the judgment was rendered before an examination of the record, and the matter can only be corrected by this

court's exercise of supervisory powers.

The reliance on testimony alone as a basis for review was highly prejudicial to petitioners, who went to the trouble and expense of presenting films, phogographs, and documentary evidence to the jury in order to prove indisputably that their constitutional rights had been violated. The appellate court's review of only transcript testimony to the exclusion of 56 items of documentary exhibits, three films and six hundred photographs, had the effect of eliminating said evidence from consideration in determining whether one document was "harmless". It is a settled rule of evidence that when a document is received in evidence it "speaks for itself", and the witness introducing it is generally not permitted to detail what it says and what its effect is. In the trial below,

the following exchange at the outset of the direct examination of plaintiff Clark, regarding the first documentary exhibit offered, indicates the trial court's disapproval of any attempt to read the document to the jury during the proceedings:

> "Q. Would you read what that paragraph says where it is marked 'used merchandise' for the jury?
>
> THE COURT: Excuse me. Wouldn't the best evidence rule apply. Doesn't the document speak for itself?
>
> MR. MURDOCK: I think it is important for the jury to understand what the document says to understand what the plaintiff understood from the document.
>
> THE COURT: Yes. I can take care of that in terms of - perhaps I will have the jurors come in tomorrow morning 15 minutes earlier than we resume, and at that time they could look at all the exhibits which are received in evidence. We

know that it is a circular, and I am sure that will serve your purpose.

MR. MURDOCK: Thank you." (R.T. 7, 1.4-17).

Thus, while the jury is charged with the duty to review and actually read the documents received, the transcript cannot and does not reflect exactly what those documents reveal, nor does the transcript enable the reviewing court to determine the impact these documents had on the jury. The failure to examine the documents, films, and photographs was a failure to examine the record.

C. THE CIRCUIT COURT'S REVIEW IGNORED THIS COURT'S DECISIONS IMPOSING AN OBLIGATION TO DETERMINE THE IMPACT OF THE DISPUTED EVIDENCE ON THE JURY IN

LIGHT OF THE ENTIRE RECORD.

The "harmless error" standard embodied in 28 U.S.C. §2111 grew out of the abuses of the appellate process, primarily in the criminal field, whereby trial court verdicts were too easily upset by errors of a technical evidentiary nature. In tracing the history of the rule, Wigmore points out that the original orthodox English rule was plain: a new trial could not be obtained upon the erroneous admission of evidence "unless upon all the evidence it appeared to the judges that the truth had thereby not been reached." 1 Wigmore on Evidence, (Third Ed.1940) §21 at 365. This also was the rule announced in 1828 by this Supreme Court in M'Lanahan v. Universal Ins. Co., 1 Pet. U.S. 170, 183, 7 L.Ed.98: "In such cases, the whole evidence is examined with minute care, and the inferences which a

jury might properly draw from it are adopted by the court itself; if therefore upon the whole case justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial."

In 1835 the English Court of Exchequer adopted a new rule which amounted to an automatic right to a new trial upon the admission of erroneous evidence, and this was soon followed and adopted in virtually all jurisdictions. (See Wigmore, supra, at 367-368). The abuses caused by the Exchequer Rule led ultimately to the enactment of statutes in various jurisdictions to require a new trial only where justice required it, but as Wigmore pointed out, judicial habits were hard to cure. (Id, at 373).

In the federal system, the legislative command to throw off the fetters of the Exchequer Rule is contained in 28 U.S.C. §2111, supra, as well as in Rule 61, Fed. Rules Civ. Proc., both of which derive from the earlier rule of 28 U.S.C.A. §391.

While this Court has analyzed the "harmless error" statute (and the appellate court's duties thereunder) in great detail in the criminal law context (see Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed. 2d 284 (1969); Schneble v. Florida, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973), Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979)), it has not

discussed the issues arising under 28 U.S.C. §2111 in a civil context. The appellate courts have looked for guidance in civil cases to the seminal opinion in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct.1239, 90 L.Ed. 1557 (1946) because of its indication that the "harmless error" standard in the Federal Rules of Civil Procedure (Rule 61) and in the criminal rules share a common genesis and are essentially the same. See, e.g., Conway v. Chemical Leaman Tank Lines, Inc., 525 F.2d 927, 929 n.3 (5th Cir. 1976); O'Rear v. Fruehauf Corp., 554 F.2d 1304, 1308 n.3 (5th Cir. 1977).

In determining the obligations imposed upon a reviewing court by the harmless error rule embodied in federal statutes, this court in Kotteakos, after reviewing the abuses that led to the

adoption of the predecessor to 28 U.S.C. §2111 (see 328 U.S. at 757-761), instructs that the appellate court's duty is to determine the effect of the erroneously admitted evidence on the jurors, given the context of the entire case, not merely as one piece of the evidence standing alone:

> "[T]he question is, ...what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. [citations omitted.] This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record." Kotteakos v. U.S., supra, 328

at 764 (emphasis added).

Thus, the duty of the appellate court is to review the record and make a judgment based upon the probable impact of the improper evidence "in relation to all else that happened." Kotteakos goes on to state that this determination can only be made "after pondering all that happened without stripping the erroneous action from the whole" (Id, at 765; emphasis added). The obligation of the appellate court under the statutory command to make its judgment only "after an examination of the record" necessarily means that a determination of "harmless error" cannot be made in a vacuum, by examination of one piece of evidence "standing alone". The instruction of Justice Story in the M'Lanahan opinion in

1828 is appropriate under the current statute: "the whole evidence is examined with minute care, and the inference which a jury might properly draw from it are adopted by the court itself...". Thus an "examination of the record" means a great deal more than mere review of the transcript; it involves "pondering" the evidence, with "minute care", to understand all that happened and how the challenged evidence may have impacted upon the minds of the jurors.

The Ninth Circuit Court of Appeals has demonstrated, in other cases, its awareness of the obligation to review all of the evidence received prior to determining the question whether improper evidence was harmless or prejudicial; in Benna v. Reeder Flying Serv., Inc., 578 F.2d 269, 271 (9th Cir. 1980) the court

concluded that there was "no question that it was error" for the jury to review an accident report. The report was expressly inadmissible by virtue of a statutory prohibition (49 U.S.C. §1441(e)). Nevertheless, the appellate court took the time to go through all of the evidence, stating:

> "The question which presents itself then is whether the jury's view of the inadmissible accident report so prejudiced appellants' case as to require a new trial. We have thoroughly reviewed the entire 2,355 pages of the reporter's transcript, the 352 pages of the clerk's record, the exhibits, and the 47 pages of the Malone accident report. From this review, it is our conclusion that a new trial is not warranted. In light of the entire record, we are convinced that the error complained of did 'not affect the substantial rights of the parties' and was therefore harmless. Fed.R.Civ.P.61; 28 U.S.C. §2111." (Id, at 271-272; emphasis added).

Contrast the review undertaken by the panel in Benna with that review afforded petitioners below, and it becomes quite obvious that the panel in petitioners' appeal "departed from the accepted and usual" practice of the Ninth Circuit's statutory duties of review. Despite the court's remark that "the record is replete with testimony, films and photographs documenting these complaints", it is nowhere stated that the court reviewed the record. The court offers no analysis or discussion of the evidence which might have been based upon such review or which might lead one to believe that the court "pondered" the evidence with minute care. On the contrary, the opinion notes that the holding makes it "unnecessary to detail the complicated facts of this case"

(650 F.2d at 1035). The court goes on to state that it "need not decide whether there was substantial evidence to support the verdict" (Id at 1039), indicating again that it has not reviewed the record in any detail. Rather than reviewing the record for harmless error and for sufficiency of the evidence, the court simply looked at the transcript of testimony and at one document, "standing alone" (conveniently presented by way of appendix to appellants' brief below), and decided it was so highly prejudicial that a new trial was necessary. The opinion states that "[T]he diary went far beyond the other evidence properly brought forth in this case", yet it was subsequently discovered that the court had not reviewed the "other evidence", had not weighed the impact of the "other evidence", nor made any determination whether it was sufficient to support the judgment for liability regardless of the receipt of the

hearsay document. How, then, could the appellate court fulfill the crucial role explained in Kotteakos, supra,: "The crucial thing is the impact of the thing done wrong on the minds of other men, not on own's own, in the total setting" (328 U.S. at 764). In this case, the appellate court isolated the impact of one exhibit on their own minds rather than attempting to assess the entirety of the evidence.

The jury was in a position to place the emotive and "sympathy arousing" evidence in its proper perspective. At times in the trial, counsel for defendants required plaintiff Bunker to read from the document in order to reveal his then state of mind to the jury, hoping obviously to discredit him. The appellate court discounts entirely the ability of the jurors to assess the weight of the document.

In doing so, the court fails to heed the admonition of its fellow circuit panel in Hill v. Rolleri, 615 F.2d 886, 890 (9th Cir. 1980), wherein it states that no prejudice results from mere receipt of hearsay where the jury "must be credited with the competence to understand" the impact of statements despite their being erroneously received in a hearsay police report. The trial judge below, taking into full consideration the "emotional" nature of the document and the opinion and hearsay material in it, determined that the jury had received sufficient testimonial and tangible, visual, evidence to determine the credibility and effect of the document and plaintiffs' obvious feelings of enmity for the city police and officials. This is part of the deliberate process of the jury, and the trial

judge determined they were sufficiently apprised of the opposing views through extensive cross-examination to reach an intelligent decision. In contrast, the reversal by the circuit court assumes, without the benefit of reviewing the actual evidence seen by the jury, that the jury was incapable of reaching a fair assessment of Exhibit 105 as one of many pieces of evidence, pro and con.

In making its determination without actually examining the record, the appellate court has violated several fundamental precepts of appellate review in addition to the statutory mandate of 28 U.S.C. §2111. First, the "reviewing court must view the evidence in the light most favorable to the prevailing party." Rasmussen Drilling v. Kerr-McGee Nuclear Corp., 571 F.2d 1144, 1149 (10th Cir. 1978). From the opinion

below it is clear that the appellate court made no attempt to view the evidence in a favorable way to plaintiffs. Obviously, a total failure to review the documents, films and photographs is a failure to review them in any light, favorable or unfavorable. But even the evidence that was reviewed is cast in a light which is contrary to the evidence. For example, the opinion states that "The diary was not made to be used in Clark's business of selling new and used merchandise." (650 F.2d at 1037). This statement is wholly without foundation and contradicts the foundation testimony of plaintiffs. The appellate court has simply chosen to create its own "fact" without evidence to support it, much less attempting to look at the document in the favorable light, consistent with the testimony and accepted

by the trial judge, that it was made to be used in the business. Next, the appellate court states that it "was expressly made for the purposes of litigation." (Id). Again, there was no testimony or evidence that this document was made for litigation. The testimony by plaintiff was that the records were kept when they commenced business, at the suggestion of a legal aid attorney. At that time, there was no litigation pending nor was there any litigation contemplated; the action herein was not filed until two years later. Furthermore, legal aid attorneys do not and can not litigate civil rights cases for damages, and no legal aid attorney participated in representing plaintiffs in the litigation. It was simply basic legal advice given to then-indigent street peddlars to keep business records of their transactions and

dealings with city officials, in order that they might comply with the law as instructed.

The appellate court next reveals a startling ignorance of even the transcripted testimony when it states "The diary does not contain records of sales or meetings or other business transactions." (Id). This statement indicates a total lack of familiarity with the testimony as well as the document itself, because the testimony reveals the genesis of the document, growing out of the need to keep records of meetings held with the city councilperson, the police, and other city officials giving conflicting advice. The appellate court's statement is flatly contradicted by the document and only serves to reinforce petitioners' complaint that the judgment was not rendered "after an

examination of the record".

Finally, the district court herein was fully aware of the totality of the evidence and of defendants' objections to the admission of the disputed document. In ruling on the motion for judgment notwithstanding the verdict, it must be assumed that the court relied upon only proper evidence "in the absence of a clear showing to the contrary". Brubeck v. Pennsylvania Railroad Company, 346 F.2d 238, 241 (7th Cir. 1965). In order to hold that the trial court erred by placing reliance on the hearsay document, one must believe that the trial judge, as much as the jury, was swayed and persuaded by the "highly emotive" document in question, much to the prejudice of defendant city and police department. This is not a tenable proposition; trial judges are not moved by

emotionally written business records.

The circuit court's reliance on United States v. Ware, 247 F.2d 698 (7th Cir. 1957) fails to note that Ware was a criminal case wherein defendant was convicted upon evidence for which no foundation had been laid under the requirements of 28 U.S.C. §1732. (Id. at 700). The opinion below also fails to draw any distinction between the burden of proof in criminal cases and civil cases, and fails to distinguish between hearsay documents prepared by government agents in the actual preparation of their case against the accused, and the hearsay document in this case which is a record kept for business purposes in trying to cope with conflicting information and advice regarding permits and licenses. The records contained in Exhibit 105 can hardly be

compared to the neat, "officially impressive", professionally prepared summary of the government's case in Ware. Exhibit 105 is a rambling record of events as they occurred, rather than an investigative report purporting to gather and compile evidence of criminal activity as in Ware.

It has been pointed out by this Court that a defendant is not entitled to a perfect trial, but only a fair one. Lutwak v. United States, 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593 (1953). The Supreme Court decisions defining the "harmless error" standard have determined that even where a criminal defendant's constitutional rights have been conceded to have been violated by receipt of inadmissible evidence, the defendant is not entitled to a new trial where the remaining evidence is sufficient to uphold the

verdict. It is now firmly established that a new trial is not automatically granted even where the trial court has violated defendant's sixth amendment right to confrontation under Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); see, Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Schneble v. Florida, 405 U.S. 427, 92 S. Ct. 1056, 31 L.Ed.2d 340 (1972); Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); U.S. v. Lutz, 621 F.2d 940, 947 (9th Cir. 1980). The court must make a determination whether the error was harmless beyond a reasonable doubt, in light of the evidence tending to prove guilt. See Harrington, supra. If so, defendant may not thwart the judicial process by obtaining a new trial based

upon a claimed error in receipt of inadmissible evidence.

Applying the reasoning of these cases to the civil context (in the absence of controlling precedents from this court), it is reasonable to postulate that a civil defendant also may not obtain a new trial (where evidence has been received in error) if the court finds that the error was harmless beyond a reasonable doubt (or perhaps by a preponderance, given the civil burden of proof). In either event, it is incumbent upon the appellate court to examine the evidence, and determine whether liability has been proven by a preponderance of the evidence regardless of the "hearsay" received erroneously. If a criminal defendant facing loss of liberty (and perhaps his life) has no right to a new

trial where constitutional violations of the rights to confrontation are conceded, does it make sense to grant a civil defendant (here the City of Los Angeles and the Los Angeles Police Department) a new trial upon the mere receipt of "emotional" hearsay evidence, where the author of the document was available and subject to extensive cross-examination? Clearly not, and the jury verdict should not be disturbed unless it can be said with confidence, after examination of the record, that the erroneously received evidence was a critical factor in the decision. In the present case, no such determination was made, or even attempted, because the court simply failed to examine the record. Defendants received a "fair trial" below. The improper admission of hearsay evidence which is merely cumula-

tive of matters shown by other admissible evidence is harmless error. See, e.g., Coughlin v. Capitol Cement Co., 571 F.2d 290 (5th Cir. 1978); Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874, 884 n.6; Bowman v. Kaufman, 387 F.2d 582, 587 (2d Cir. 1967); Juaire v. Nardin, 395 F.2d 373, (2d Cir. 1968); Hill v. Rolleri, 615 F.2d 886, 890 (9th Cir. 1980); Lenz v. Southern Pacific Company, 493 F.2d 471, 472 (5th Cir. 1974); Warrick v. Brode, 428 F.2d 699, (3rd Cir. 1970), York v. Adams, 79 F.R.D. 142 (W.D.Pa. 1978); Liner v. J.B. Talley & Co., 618 F.2d 327, 329 (5th Cir. 1980); United States v. Hedman, 630 F.2d 1184 (7th Cir. 1980).

Proper disposition of this issue would have been to follow the analysis succinctly stated in Koppinger v. Cullen-

Schiltz & Associates, (8th Cir. 1975) 513 F.2d 901, 907, wherein objection was made to the receipt of an investigative report under the business record exception:

> "The report contains a great deal of hearsay. It is not of the species which has been classified as having any special indicia of trustworthiness. [citations omitted].
>
> . . .
>
> The trial judge has broad discretion regarding the admissibility of evidence. Raycraft, supra, at 31-32. The court considered the admissibility of Exhibit 51 with care. We find that the admission of the report was cumulative and, at most, harmless error. Schnider was extensively cross-examined. The matters contained in his report were all the subject of other testimony in the case. No prejudice has been shown." (Emphasis added).

In the opinion below, the court determines that defendants were "prejudiced" by the evidence, yet there is no

showing, by analysis of evidence, that they were in fact prejudiced. Prejudice is shown in the situation presented by Standard Oil Co. of Cal. v. Moore, supra, wherein the court explicitly states that it has made "an examination of the voluminous record of testimony and exhibits" (Id at 205, and see n.16), and determined that the evidence did not provide substantial support for the jury finding of an agreement, combination, or conspiracy (Id). The prejudicial effect of business records received without foundation was undeniable and uncontested:

> "That the introduction of these exhibits was prejudicial to appellants is not denied...
>
> "If none of these inadmissible exhibits had been received, the evidence would have been insufficient to support the jury finding that there was an unlawful agreement, combination or conspiracy." (Id at 216-217).

The existence of actual prejudice, such as that shown in Moore, is a prerequisite to finding that the claimed error has affected the "substantial rights" of the party appealing, as required by 28 U.S.C. §2111. One does not have a "substantial right" to the mere substitution of an appellate court's judgment for that of the trial court regarding a particular hearsay exception. There must be a showing of actual prejudice, not a conclusory statement based upon examination of the document standing alone.

The appellate court's failure to examine the record and engage in any analysis of the weight of the evidence or the cumulative nature of the challenged hearsay evidence violates the statutory mandate and ignores the teachings of this

court in Kotteakos, supra, as well as the earlier case of United States v. Socony Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1939). In Socony Vacuum, the court states that the "record minus that [hearsay] testimony clearly establishes all the facts necessary for proof of the illegal conspiracy." (Id, 310 U.S. at 235). The court explicitly rules that ordering a new trial would violate the harmless error statute:

> "Hence assuming, arguendo, that there was error in the use of the prior testimony, to order a new trial would be to violate the standards of §269 of the Judicial Code (28 USCA §391), since the "substantial rights" of respondents were not affected. There are no vested individual rights in the ordinary rules of evidence; their observance should not be reduced to an idle ceremony. (Id., emphasis added).

## CONCLUSION

While this Court's opinions demonstrate that the "Rule of the Exchequer" has been emphatically abolished in criminal cases, the opinion below demonstrates that little progress has been made in the civil context since the time of Wigmore's succinct lament in 1940:

> "The fetters of the pernicious rule of the Exchequer were not forged by mere precedent, but by professional habit and tendency. They cannot be struck off by a simple statute. This has been tried; but almost in vain...by an emasculating interpretation, or by a virtual obliteration, the statutes have effected little progress - so far as their mere legislative command is concerned." (Wigmore, supra, at 373).

The "mere legislative command" of 28 U.S.C. §2111 was insufficient to cause the circuit court to examine the record

before remanding for a new trial below, despite petitioners' insistence that the document was harmless. It is apparent that the lack of a forceful precedent from this Court in a civil decision has left a void that must be filled if we are to avoid repetitious litigation. Departure from the proper appellate review not only burdens our system with additional trials as in this case, it encourages contentious ligigators to file appeals whenever an evidentiary ruling of the trial court is questionable.

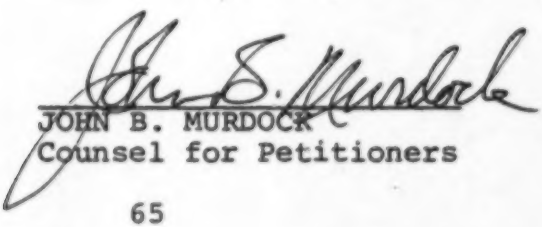
The opinion below also indicates a need for instruction from this Court as to the proper role of the trial court's discretion in evidentiary rulings under the new Federal Rules of Evidence. Stripped to its essentials, the opinion below

amounts to a mere substitution of judgment by the appellate court as to the supposed prejudice of a document that may or may not fall within a hearsay exception. The opinion relies on cases decided prior to adoption of the new rules and fails to recognize the shift in emphasis away from academic perfection, toward a search for the truth. At some point the litigation must come to an end. It is the trial judge who must make a determination of admissibility in the context of the entire trial. In civil trials, no less than criminal cases, unless it can be shown with certainty that the result would have been otherwise if the evidence had been excluded, the verdict of the jury should not be disturbed. In this case, the jury rejected a "good faith" defense and found that plaintiffs had been

denied due process and equal protection.

The failure to examine the record before judgment was clearly improper. The failure to correct the error (once it had been pointed out by petitioners) by assigning the record to an unbiased panel for rehearing, requires that the matter be transferred to this Court for proper statutory review, examining the record before determining the harmlessness of Exhibit 105. Accordingly, Petitioners respectfully request that a writ of certiorari issue to transfer the record and determine whether there was error in the receipt of evidence, and if so, to determine the evidence to support the verdict.

Respectfully submitted,



JOHN B. MURDOCK
Counsel for Petitioners

# Appendix

# APPENDIX

# A

## OPINION, CIRCUIT COURT:

## CLARK V. CITY OF LOS ANGELES, 650 F.2d 1033 (9th Cir. 1981)

Ruth CLARK and Charles E. Bunker,
Plaintiffs-Appellees and
Cross-Appellants,

v.

The CITY OF LOS ANGELES, et al.,
Defendants-Appellants and
Cross-Appellees.

Nos. 79-3103, 79-3121

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 12, 1980.

Decided July 13, 1981.

Cite as 650 F.2d 1033 (1981)

S. Thomas Todd, Deputy City Atty., Los Angles, Cal., for City of Los Angeles.

John B. Murdock, Santa Monica, Cal., for Clark & Bunker.

Appeal from the United States District Court for the Central District of California.

Before GIBSON,*SNEED, and SKOPIL, Circuit Judges.

*The Honorable Floyd R. Gibson, Circuit Judge for the Eighth Circuit.

SKOPIL, Circuit Judge:

The appellants, City of Los Angeles ("the City") and the Los Angeles Police Department ("the LAPD") appeal from a judgment of $60,000.00 entered on a jury verdict in favor of the appellees, Ruth Clark and Charles E. Bunker. At trial Clark and Bunker asserted that the appellants selectively enforced the law, denied due process, and conspired to deny appellees Clark and Bunker's Civil Rights in violation of 42 U.S.C. §§1983 and 1985(3). Appellees cross-appeal, claiming that a portion of the zoning laws is unconstitutionally overbroad. We reverse the verdict and damage award and remand for a new trial. We affirm the denial of appellees' motion to declare the zoning laws unconstitutional.

I

Since 1974 appellees Clark and Bunker have engaged in business as vendors on Ocean Front Walk in the Venice area, City of Los Angeles. Appellees presented evidence that certain permit and zoning requirements were discriminatorily enforced against them but not against others similarly situated, that they were continually harassed by police and zoning officials for failure to comply with those permit requirements, and that they were given incorrect, misleading or incomplete information by city building and zoning officials.

Because of our holding, it is unnecessary to detail the complicated facts of this case. City ordinances prohibit vending on public property. To sell new merchandise on private property, a retail

business license issued by the city clerk and a tax certificate issued by the State Board of Equalization are required. To sell used merchandise on private property, a special permit must be obtained from the Los Angeles Police Commission. The retail business license and tax certificate are issued without a determination that prospective sales will be in conformity with zoning requirements. The permit to sell used merchandise is issued by the Los Angeles Police Commission when the applicant will be in compliance with zoning requirements and presents a zoning referral slip from the Department of Building and Safety. The zoning ordinance in effect in Venice in the areas relevant to this case states that business activities must be "conducted wholly within an enclosed

building." L.A.M.C. §12.13 (A)(2)(b)(2). Thus, the zoning ordinance prohibits outdoor sales of new or used merchandise in these areas.

After being told by police that it was unlawful to sell on public property, appellees rented space on private property. They sublet space to other vendors. Appellees obtained the license and tax certificate required to sell new merchandise at this location. Appellees' application for a permit to sell used merchandise was not accepted by the Police Commission because no zoning referral slip was issued since open-air sales were not allowed in their zone. There were many incidents between appellees and police involving checking of vendor's permits and warnings against selling. Appellee Clark was arrested for selling a used magnifying glass for 25

cents, the only person arrested in recent years for selling used merchandise without a permit.

Appellees continually complained to the police and zoning officials and other city officials in person, by telephone, and by letter that others in the area were conducting open air merchandise sales in violation of the zoning ordinances. The record is replete with testimony, films and photographs documenting these complaints.

In February 1977 appellees brought suit against the City of Los Angeles ("the City"), the Los Angeles Police Department ("the LAPD"), and various individuals, all police officers, seeking damages and injunctive relief. The district court issued a preliminary injunction barring the LAPD

from entering appellees' property to interrogate them concerning certain licenses.

Jury trial commenced in November 1978. Appellees' pretrial motion to declare zoning ordinance L.A.M.C. §12.13(A)(2)(b)(2) unconstitutional was denied. Appellees alleged a conspiracy to violate their rights to due process and equal protection by denying their application for a permit, continually giving them misinformation, and selectively enforcing the law against them but not against others selling used merchandise not in an enclosed building. The suit was brought pursuant to 42 U.S.C. §§ 1983 and 1985(3), and jurisdiction was based on 28 U.S.C. §§1331 and 1342. The jury awarded appellee Clark $20,000 in damages from the city and $20,000 from the LAPD. Appellee Bunker

was awarded $10,000 from the City and $10,000 from the LAPD. The four individual defendants were found not liable. The distrit court denied appellants' motions for judgment notwithstanding the verdict for a new trial.

II

The issues presented for review are:

(1) Whether the district court committed reversible error by admitting into evidence Plaintiffs' Exhibit No. 105, a 216-page account of the appellees' encounters with the police;

(2) Whether substantial evidence supports the jury verdict awarding $60,000 in damages to the appellees from the City of Los Angeles and the L.A.P.D.;

(3) Whether L.A.M.C. §12.13(A)(2)(b)(2), a zoning ordinance which requires

that all business activities be "conducted wholly within an enclosed building" is unconstitutionally overbroad.

III

[1] It is unclear under what grounds Plaintiffs' Exhibit No. 105 was admitted. It was offered into evidence under Fed.R.Evid. 803(6), the business record hearsay exception; 803(5), the recorded recollection hearsay exception; and 803(24), the catchall exception to the hearsay rule for statements probative of material facts that have substantial guarantees of trustworthiness and whose admission would serve the interests of justice. If the grounds given by the district court for admissibility of the evidence are incorrect, the court's ruling will be reversed only if there are no grounds under which the evidence could

properly have been admitted. SEC v. Chenery Corp., 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed.626 (1943).

[2] For a memorandum or record to be admissible as a business record, it must be (1) made by a regularly conducted business activity, (2) kept in the "regular course" of that business, (3) "the regular practice of that business to make the memorandum," (4) and made by a person with knowledge or from information transmitted by a person with knowledge. Fed.R.Evid. 803(6).[1]

1/ The complete text of Fed.R.Evid.803(6) is as follows:

"(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of

[3,4] For a record to be considered as having been made in the regular course of business it must be "made pursuant to established company procedures for the systematic or routine and timely making and preserving of company records", Standard Oil Co. of California v. Moore, 251 F.2d 188, 215 (9th Cir. 1957), cert. denied, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958), and relied upon by the business in the performance of its functions. La Porte v. United States, 300 F.2d 878, 880 (9th Cir. 1962). The basis for the business record exception is that accuracy is assured because the maker of the record relies on the record in the

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information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

ordinary course of business activities. See Advisory Committee Note to Rule 803(6).

[5,6] Hearsay in business records is not specifically excludable. However, hearsay statements are admissible only if the observer or participant in furnishing the information to be recorded was "acting routinely, under a duty of accuracy, with employer reliance on the result, or in short 'in the regular course of business'". United States v. Pitman, 475 F.2d 1335 (9th Cir. 1973), cert. denied, 414 U.S. 873, 95 S.Ct. 146, 38 L.Ed.2d 92; Advisory Committee Note to Rule 803(6). Expressions of opinion or conclusions in a business record are admissible only if the subject matter calls for an expert or professional opinion and is given by one with the required competence. Standard Oil Co.

of California v. Moore, supra, 251 F.2d at 214.

[7] Plaintiffs' Exhibit No. 105 is a diary. It was written by appellee Clark, who began taking notes at the suggestion of a legal aid attorney. The 216-page diary chronicles the appellees' encounters with the police, their discussions with other vendors and city officials, and describes the appellees' and other vendors' feelings about those encounters and discussions. It is replete with hearsay and multiple hearsay entries. The diary was not made to be used in Clark's business of selling new and used merchandise. It was expressly made for the purpose of litigation. The diary does not contain records of sales or meetings or other business transactions. Neither appellee relied on the diary in conducting

business.

The diary should not have been admitted as a business record exception to the hearsay rule. It was not prepared in the regular course of a business activity, nor was it used in the routine operation of the business or agency. The diary is replete with instances of hearsay and multiple hearsay and non-expert opinion which is not independently admissible. Further, a document prepared for purposes of litigation is not a business record because it is lacking in trustworthiness. Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943).

[8] A memorandum or record is admissible under the recorded recollection exception to the hearsay rule if (1) the witness once had knowledge, (2) now has insufficient recollection to testify fully,

and (3) the record was made by the witness when the matter was fresh in his memory and reflected his knowledge correctly. Fed.R. Evid. 803(5);[2] United States v. Edwards, 539 F.2d 689 (9th Cir. 1976), cert. denied, 429 U.S. 984, 97 S.Ct. 501, 50 L.Ed.2d 594.

[9] We do not need to determine whether the document was properly admissible under this exception, because even if the trial court correctly admitted it into evidence as recorded recollection, it erred in permitting such memorandum to be received as an exhibit when not offered by the ad-

2/ The test of Fed.R.Evid. 803(5) provides:

"(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."

verse party.[3] Rule 803(5) provides that the memorandum may be received as an exhibit only if offered by an adverse party. Here the diary was offered by appellees and received as an exhibit. Appellants did not offer the exhibit as evidence, but continually objected to its introduction.

[10, 11] A statement that is not specifically covered by any of the enumerated exceptions to the hearsay rule but that has equivalent circumstantial guarantees of trustworthiness can be admissible, providing the court makes certain preliminary determinations. Fed.

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3/ Appellants do not object to some uses of the diary pursuant to the recorded recollection hearsay exception in which appellee Bunker read the relevant portions into the record, at least as to the passages that are not inadmissible because of opinion or hearsay.

R.Evid. 803(24).[4] The diary is clearly not admissible under this exception to the hearsay rule. It does not have circumstantial guarantees of trustworthiness equivalent to the enumerated exceptions. Lack of trustworthiness makes it inadmissible.

[12] Admission of plaintiffs' Exhibit No. 105 was error. Its admission was reversible error because its contents

4/ Fed.R.Evid. 803(24) provides:

"(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

were highly prejudicial to the appellants. The diary is a heavily emotive document that does not simply relate factual occurences, but is written in a style designed to arouse sympathy and create enmity for the appellants. Further, the document constitutes a written account of practically all of appellees' case against the appellants. See United States v. Ware, 247 F.2d 698 (7th Cir. 1957).

Appellees argue that the diary is mere surplusage and cumulative, since there was overwhelming other evidence from the testimony of appellees and other witnesses and the numerous photographs, films and other exhibits, and that reversal is not appropriate. We cannot agree. The dairy went far beyond the other evidence properly brought forth in this case, in that it contained much hearsay and opinion

statements, and was written in a highly emotional and sympathetic manner.

[13,14] Appellees also argue that references to the diary by counsel for the appellants constitutes a waiver of appellants' objection to admission of the diary in evidence, or at the very least invited the prejudicial effect of the diary. Reference to evidence admitted over a party's objection does not constitute a waiver of their original objection. Otherwise, a party would unfairly be required to give up its opportunity to convince the jury to find in its favor in order to preserve its right to raise evidentiary issues on appeal. A party in its closing argument must deal with the evidence which the jury will consider, including evidence admitted over objection. In addition, all references to the diary during closing argument by

appellants' counsel involved what the diary did not contain, i.e., lists of merchandise sold or records of monies collected, the absence of which would tend to show that the diary was not reliable.

Since the admission of the diary was improper and constitutes reversible error, we reverse and remand for a new trial.

IV.

Since we reverse and remand for a new trial, we need not decide whether there was substantial evidence to support the verdict.

V.

Appellees, in a cross appeal, contend that the zoning ordinance L.A.M.C. §12-13(A)(2)(b)(2), which requires that all commercial activities be "conducted wholly within an enclosed building", is unconstitutionally overbroad.

[15,16] The overbreadth doctrine holds that a law is void on its face if it sweeps within its ambit not solely activity that is subject to governmental control, but also includes within its prohibition the practice of a protected constitutional right. Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965). The overbreadth doctrine has been applied almost exclusively in the areas of first amendment expressive or associational rights. Broadrick v. Oklahoma, 413 U.S. 601, 612, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973); Dombrowski, supra, 380 U.S. at 486-87, 85 S.Ct. at 1120-22; Chase v. Davelaar, 645 F.2d 735, at 737 (9th Cir.1981); see L.Tribe, American Constitutional Law 710-12 (1978). Cross-appellants claim that the zoning ordinance

inhibits, not their exercise of a first amendment right, but solely of their right to earn a living. In this case this interest is insufficient to invoke the overbreadth doctrine.

Cross-appellants appear to argue that the ordinance is unconstitutional because it creates an unbridled discretion in the zoning officials to determine who shall be prosecuted for its violation. They argue that the ordinance has been enforced only against open-air vendors and not against other commercial activities outside of buildings such as sidewalk cafes, outdoor display tables, and other used merchandise sales.

[17] Ever assuming these allegations are true, they would be insufficient to find the ordinance itself unconstitutional. Zoning regulations that attempt

to regulate the use of property have generally been upheld if the ordinance bears a rational relationship to a legitimate governmental interest. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 676, 96 S.Ct. 2358, 2363, 49 L.Ed.2d 132 (1976); Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) American Savings & Loan Assn. v. County of Marin, 653 F.2d 364, at 370-71 (9th Cir. 1981); Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250, 254 (9th Cir. 1974). The ordinance here has several possible rational bases, such as public safety, preservation of the scenic environment, and aesthetics.

[18] Further, other provisions of the zoning code provide for appeals from zoning decisions made by the Department of

Building and Safety, L.A.M.C. §12.27(A), and also provide for conditional use permits and for variances if unnecessary hardship or special circumstances exists. L.A.M.C. §§12.24 and 12.27(B). The procedures ensure that the exercise of authority under the zoning ordinance here is not unrestrained and arbitrary, and distinguish this case from the unbridled discretion condemned in the ordinance in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

Accordintly, the trial court's denial of appellees' motion to declare the zoning ordinance unconstitutional is AFFIRMED.

The judgment is REVERSED and REMANDED for a new trial.

# APPENDIX

# B

# DECLARATION OF JOHN B. MURDOCK, COUNSEL TO APPELLEES, IN SUPPORT OF PETITION FOR REHEARING EN BANC

DECLARATION OF JOHN B. MURDOCK COUNSEL TO APPELLEES, IN SUPPORT OF PETITION FOR REHEARING EN BANC, WITH EXHIBITS

I, JOHN B. MURDOCK, declare as follows:

1. I am an attorney duly licensed to practice law in this jurisdiction and have been admitted to practice before this Court.

2. I have represented plaintiff-appellees throughout all proceedings below, during trial, and in the instant appeal.

3. Upon reviewing the slip opinion of this Court decided July 12, 1981, I determined that a major question in the reply brief had not been fully addressed or discussed, to wit, whether the receipt of Exhibit 105, if admitted in error as determined by this Court, constituted harmless error in view of the weight and cre-

dibility of the totality of evidence in the trial. It appeared to me that the failure to discuss the evidence in depth, as well as the failure of the Court to reach and decide the second asserted ground of appeal (i.e., whether there was "substantial evidence" to support the verdice) was an indication that the panel of the Court of Appeals had not in fact reviewed the actual exhibits received at trial before rendering its decision.

4. Upon reviewing the docket sheet of the district court, it became evident that the physical exhibits were not transmitted to the Court of Appeals, because no request for transmittal was received. This was explained to me by the Clerk of the Court of Appeals in Los Angeles, Ms. Lenore Wallace, and the Custodian of Exhibits in

Los Angeles, Mr. Lee Smith. Mr. Smith confirmed that the exhibits were still in custody in Los Angeles. Ms. Wallace explained that the absence of any entry in the docket sheet showing transmittal of physical exhibits and absence of a supplement to the Index on Appeal confirms that the exhibits were not requested or transmitted. A certified copy of the last three pages of the aforementioned docket sheet (including all entries from commencement of trial to present date) is attached hereto as Exhibit "A", and the Court is requested to take judicial notice thereof.

5. When the within appeal was originally filed by appellant and the designation of record failed to explicitly include the exhibits received at trial, the undersigned filed a designation to require that

all exhibits be included in the record on appeal, inasmuch as the two major issues (weight of evidence to support verdict; "harmless error" of one document) would require the Appellate Court's review of all evidence received. See "Notice of Demand for Designation of Additional Portions of Record", copy attached hereto as Exhibit "B" at p. 2 line 2, entered and filed 2/5/79 per docket sheet (Exhibit A hereto). Defendants responded by stating that they have "designated all proceedings at trial" and that "no additional designation of the record is required". (See Exhibit "C"). I was informed, upon inquiry to the court clerk as to the method of compelling appellant to physically transmit the bulky exhibits, that pursuant to rules of the Ninth Circuit, the exhibits are not transmitted unless and until requested by the

court. (See Local Rules 4).

6. Due to the lack of time to obtain a certified copy of the Docket Sheet of the Ninth Circuit, I am unable to attach same hereto. However, I have telephoned the clerk responsible for docket entries in San Francisco, Mr. Ernesto Cruz, as well as the clerk who has physical control of exhibits received the case, Mr. Peter Voelker, and they confirmed that the Docket Sheet and control cards contain no entry showing that the trial exhibits were transmitted to or received at the Court in San Francisco. I therefore request that the Court take judicial notice of its file in this matter, including the docket sheet and exhibit control card.

7. From all of the foregoing, I have concluded that the decision of the Court was

reached without viewing the three films and approximately 600 photographs presented to the jury, as well as the documents received in evidence.

I declare under penalty of perjury that the foregoing statements are true and correct. This declaration is executed on July 30, 1981, at Santa Monica, California.

/s/JOHN B. MURDOCK
JOHN B. MURDOCK

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Telephone: (213) 451-4783

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| RUTH CLARK & CHARLES E. BUNKER,<br><br>Plaintiffs,<br><br>vs.<br><br>THE CITY OF LOS ANGELES, et al.,<br><br>Defendants. | No. CV 77-0498-RMT<br><br>NOTICE OF APPELLANT'S FAILURE TO COMPLY WITH RULE 10, FED. RULES OF APP.PROC.; NOTICE OF DEMAND FOR DESIGNATION OF ADDITIONAL PORTIONS OF RECORD. |

NOTICE IS HEREBY GIVEN that Appellants have failed to comply with Rule 10(b) Fed. Rules of App.Proc., in that they have not served upon Appellees, within 10 days of filing a notice of Appeal, a "statement of

issues [they] intend to present on appeal." Accordingly, Appellees are unable to determine what additional parts of the record, not designated by Appellant, will be necessary for a full review of the issues and Appellees do hereby serve upon Appellant, pursuant to Rule 10(b) Fed.Rules App.Proc., a demand that all of the record of all proceedings in the District Court be designated and furnished by Appellants for consideration on appeal. In addition to the extent that Appellants designation of partial papers and exhibits on file is inconsistent with Rule 10(a) Fed.App.Proc., Appellees object thereto and demand that all such papers and exhibits be included in the record.

Dated: February 1, 1979.

/s/ John B. Murdock

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Telephone: 485-3626

Attorneys for Defendants/Appellants
CITY OF LOS ANGELES

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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|---|---|
| RUTH CLARK and CHARLES E. BUNKER,<br><br>Plaintiffs,<br><br>vs.<br><br>CITY OF LOS ANGELES, et. al.,<br><br>Defendants. | NO. 77-0498-RMT<br><br>APPELLANTS' RESPONSE TO APPELLEES' NOTICE OF FAILURE TO COMPLY WITH RULE 10 AND DEMAND FOR DESIGNATION OF RECORD |

Appellees' "Notice of Failure and Demand for Designation of Additional Portions of Record" is inappropriate and insufficient.

First, appellants have designated all proceedings at trial. Therefore, since "the

entire transcript is to be included," there is no requirement for the service upon appellees of a statement of issues intended to be presented on appeal. F.R.Civ. P.10(b).

Second, even if appellees' demand is properly based, it is unintelligible. F.R. Civ.Proc.10(b) requires the appellee to "file and serve on appellant a designation of additional parts to be included." But the appellees' notice herein merely demands that "all of the record of all proceedings in the District Court be Designated," without specifying which proceedings on which specific date must be added.

For these reasons, appellants are of the view that no additional designation of the record is required.

DATED: February 27, 1979.

Respectfully submitted,

BURT PINES, City Attorney
JOHN T. NEVILLE, Sr. Assist.
City Attorney

by:
DANIEL U. SMITH
Deputy City Attorney

Attorneys for Defendant/
Appellants
CITY OF LOS ANGELES

# APPENDIX

# C

## CIRCUIT COURT ORDER, REJECTING PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| RUTH CLARK and CHARLES E. BUNKER, | ) | Nos. 79-3103 and 79-3121 |
| Plaitniffs-Appellees and Cross-Appellants, | ) | ORDER |
| vs. | ) | |
| THE CITY OF LOS ANGELES, et al., | ) | |
| Defendants-Appellants and Cross-Appellees. | ) | |

Appeal from the United States District for the Central District of California Robert M. Takasugi, District Judge, Presiding

Before: GIBSON,* SNEED, and SKOPIL, Circuit Judges.

The transcripts of the court proceedings contain testimony and narratives by witnesses describing the exhibits as they were introduced into evidence. The panel has physically viewed the exhibits and finds that the testimony in the transcripts

was sufficient on which to base its decision.

Judges Sneed and Skopil have voted to reject the suggestion for rehearing en banc, and Judge Gibson recommended rejection of the suggestion for rehearing en banc. The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote.

The suggestion for rehearing en banc is rejected.

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*The Honorable Floyd R. Gibson, Circuit Judge for the Eighth Circuit, sitting by designation.